Petition

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. _____

GERALD NICHOL,

Petitioner,

vs.

STATE OF OREGON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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In the Supreme Court of the United States

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No.

GERALD NICHOL,

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Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon

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QUESTIONS PRESENTED FOR REVIEW

1. When a closed container, innocent in appearance, seized from a vehicle, but not opened, and held for six hours during which time a Search Warrant is obtained, is the *seizure* justified by the subsequent Warrant, or is the seizure itself subject to the same tests of reasonableness and probable cause as those tests applied to the search itself under *United States v. Jeffers*, 342 US 48, 51, 72 S Ct. 93, 96 Led 59 (1951); *United States v. Thomas*, 16 USCMA 306, 36 CMR

472; and *Brinegar v. United States*, 338 U.S. 160, 175, 93 Led 1879, 69 S Ct. 1302 (1949).

2. Is the original seizure of an innocent appearing, flat letter-sized sachel, zipped closed, located in the passenger portion of a vehicle justified by the finding of evidence of large quantities of marijuana in the trunk and a small quantity of marijuana (less than an ounce) on a passenger-co-defendant and a roach clip in the passenger portion of said vehicle. *New York v. Belton*, _____U. S._____, 69 LEd 768, 101 S.Ct. _____; *Robbins v. California*,_____U. S._____, 69 LEd 2d, 744, 101 S.Ct._____.

3. Do exigent circumstances exist justifying the opening of the trunk of a vehcile under circumstances where one of the passengers is in possession of less than an ounce of marijuana, a roach clip is found in the passenger portion of the vehicle, and the Defendant-driver has stated that he didn't know if there was marijuana in the car, or how much was in the car.

4. Do exigent circumstances exist justifying the seizure of a closed container innocent in appearance, when found in the rear seat portion of a vehicle under circumstances where the defendants are placed in custody and the vehicle is not seized and no search warrant for said vehicle obtained. *New York v. Belton*, _____U. S._____, 69 LEd 768, 101 S.Ct._____; *Robbins v. California*,_____U. S._____, 69 LEd 2d, 744, 101 S.Ct._____.

5. Has a Defendant's right, under the United

States Constitution to a speedy trial been violated under circumstances where a 14 month post-indictment, post-arrest delay occurred, with nine months of said delay being the time required by the Circuit Court trial judge to rule on a Motion to Suppress Evidence under *Barker v. Wingo,* 407 U.S. 514, 33 LEd 2d 101 (1972); as adopted in *State v. Ivory,* 278 Or. 499, 654 P2d 1039 (1977) and other cases indexed and cited within the body of this brief.

GROUNDS FOR JURISDICTION

Defendant was found guilty after a trial without jury on the 6th day of March, 1981 of the charge of possession of amphetimines as set out as Count I, and was found not guilty by the same judge on the same day of Count II, charging possession of marijuana over one avoirdupois ounce. This guilty finding was appealed to the Court of Appeals of the State of Oregon on the 19th day of May, 1981 and was affirmed by said Court on the 19th day of December, 1981. The Petition for Rehearing which serves also as a Petition for Review in the Supreme Court of the State of Oregon, was finally denied by the Supreme Court on March 3, 1982. There has been no request or order for an extension of time within which to petition the Supreme Court of the United States for certiorari.

The jurisdiction of the Supreme Court of the United States in invoked under 28 U. S. Code, Section 1257, Paragraph 3.

Constitutional provisions relied upon with their

citations appear as follows:

"The right of the people to be secure in their persons * * * papers and effects against unreasonable searches and seizures shall not be violated and no warrant shall issue but upon probable cause supported by oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. Amend. IV

" * * * No person shall * * * be deprived of life, liberty or property without due process of law." U.S. Const. Amend. V

"No State shall * * * deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protections of the law." U.S. Const. Amend. XIV

"In all criminal prosecutions the accused shall enjoy the right to speedy and public trial by an impartial jury of the State and district where the crime shall have been committed * * * and to have the assistance of counsel for his defence." U. S. Const. Amend VI

STATEMENT OF THE CASE

The acts for which the Defendant is accused occurred January 18, 1980. The Defendant was released on bail shortly thereafter, and was tried on March 4, 1981, Thirteen and one-half months from the date of the incident. The trial date was originally set for April 16, 1980.

On the 11th day of April, 1980 the Defendant filed a Motion and Affidavit to suppress the evidence, citing as authorities, United States Constitutional Rights under the Fourth Amendment and the Fourteenth Amendment to the Constitution of the United States.

On the 15th day of April, 1980 the Defendant affirmatively and in writing, waived his right to a jury trial and agreed to proceed with the trial as scheduled on the 16th day of April, without a jury.

The day set for trial the State of Oregon filed a Response to Defendant's Motion to Suppress and the Court did not proceed with the trial until March 4, 1981. By that time the Defendant's attorney had resigned from the Bar, and left the jurisdiction and the Defendant was required to retain another attorney, who filed a Motion to Dismiss, based upon the failure of the State to grant a speedy trial and cited therein the Sixth Amendment to the Constitution of the United States as incorporated by the Fourteenth Amendment to the Constitution of the United States.

This Motion was denied just prior to trial and the without a jury was held on March 4, 1981.

Those above recited facts in this Statement of the Case pertains to the question involving a speedy trial.

The Appellate court did not answer any of the arguments submitted to them regarding that assignment of error, but included on the following footnote in their opinion:

"Footnote 1: A second assignment of error involving denial of Defendant's Motion to Dismiss for lack of speedy trial does not require discussion."

This issue was included as a basis for rehearing and for Writ of Review filed with the Supreme Court of Oregon and review was denied.

As to the other questions the Statement of the Case involves the following facts:

Defendant was acquitted in the trial court of possession of marijuana (Count II) and was convicted of possession of amphetimines (Count I) said amphetimines being found inside of a flat, composition-type sachel, closed with a zipper, of approximate stationery size.

Defendant was stopped by Trooper Collins for speeding. It is agreed the stop was valid. As Collins approached the driver's window, he smelled marijuana smoke. The Defendant was the driver. There was a passenger beside him (Laude). Collins requested and received Defendant's identification. As Collins proceeded with his preliminary investigation, another officer, Routt, arrived to assist. At Collins request, Defendant got out of the car. Collins then asked Defendant if there was marijuana in the car, and if so, where it was located. Initially Defendant said he did not know. He then admitted that marijuana was somewhere in the car, but claimed he did not know where. Defendant also said, in response to the questioning by Collins, that he did not know

how much marijuana was in the car or whether his passenger, Laude, possessed any. Collins conducted a pat down frisk of Defendant's outer clothing. He did not find any contraband on Defendant. Collins then had Laude get out of the car. When questioned about the odor of marijuana, Laude responded that he had some marijuana on him and that he had just finished smoking a marijuana cigarette. During this conversation Collins observed, in plain view, a plastic bag partially protruding from Laude's pocket. It appeared to contain less than an ounce of marijuana (in Oregon less than an ounce of marijuana is not a crime, but an infraction punishable by a maximum $100.00 fine). Following a pat down frisk of Laude for weapons, Collins searched the passenger compartment of the car. He found a scissor type clamp that was stained brown and that smelled of burnt marijuana. In the backseat he found a sachel that has been previously described as a flat, stationery size, sachel, zipped closed. He agreed that this sachel, in and of itself, gave no appearance of impropriety or any odor identifiable with contraband and had no characteristics that would reveal its contents. The officer took the sachel into his possession, removed it from the vehicle, but he did not open the sachel, but placed it away from the control of the Defendant. The police officer then asked whether or not he could search the vehicle, and the Defendant replied,"no". The police officer, nevertheless, removed the ignition key and opened the trunk. There he found a

closed, brown paper bag, some suitcases, and a metal toolbox. He lifted the bag and determined it was light in weight. He claimed he detected an odor of marijuana coming from it and therefore opened it, where inside he found a white, opaque, plastic bag, with a stem, which he believed to be a marijuana stem protruding from a hole in the plastic bag. He opened the plastic bag and found a large quantity of marijuana.

At that point he placed both the Defendant and the passenger under arrest. The officer then seized the sachel and testified that he seized it because he found the marijuana in the trunk. He testified further that he would not have seized the sachel and taken it into his possession if he had not found the marijuana in the trunk since the marijuana found on Laude was less than an ounce and would normally not cause him to arrest its possessor. He did not claim that he seized it pursuant to a lawful arrest, because the sachel had already been removed prior to the arrest.

The officer did not impound the vehicle, nor seek a Search Warrant for the car, nor for the suitcases in the trunk of the car, and did not complete the search of the vehicle as to the suitcases in the trunk. The sachel was held at the police station for six hours at which time it was opened, pursuant to a warrant that had been obtained in the meantime and in it were the amphetimines for which the Defendant was convicted of possessing.

In *State v. Elkins,* 245 Or. 279, 422 P2d 250, at page 284 the following language appears:

> "The following question is posed by this case. When an officer has made a lawful arrest and is conducting a lawful search and observes something he does not know to be contraband but of which he is suspicious, may he take it and be sustained in his seizure if his suspicions subsequently prove to be well founded? * * * * * * * * * In *United States v. Jeffers,* 342 US 48, 51, 72 S.Ct. 93, 96 LEd 59 (1951) the court said: 'the Fourth Amendment prohibits both unreasonable searches and unreasonable seizures, and its protection extends to both 'houses' and 'effects.' * * *" (footnote omitted)
>
> In *State v. Chinn,* supra, 274, this court used the following language relative to the rules applicable to seizure:
>
> > "We hold that the limits of reasonableness placed upon the search, and which we have discussed above, are equally applicable to seizures" * * * * *
>
> * * * in *United States v. Thomas,* 16 USCMA 306, 36 CMR 472 * * * * *
>
> "Search and seizure are separate acts. Each must satisfy the constitutional requirement of reasonableness. A search can be legal, yet the resultant seizure of property or papers discovered in the course thereof may be illegal.

> It is with seizure of the bottle that we are here concerned and not with any antecedent search. The Government urges that such was reasonable under the circumstances, but we must disagree. Whether a seizure is reasonable depends upon the existence of probable cause for that action. (Citations omitted) There must be facts and circumstances from which the probability of the item's contraband nature may be inferred - 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act.' *Brinegar v. United States,* 338 U.S. 160, 175, 93 LEd 1879, 69 S Ct. 1302 (1949). There is simply no basis shown on this record for any conclusion by Sergeant Lively that the seized bottle contained narcotics or that accused was under its influence. Indeed, he did not even testify he suspected such to be the case * * *".

and further on in the Elkins case the Court, speaking now as to the facts of the Elkins case itself, quotes as follows:

> "If the rule were otherwise, an officer who desired to inculpate an arrested person in another crime, could seize everything in such persons immediate possession and control upon the prospect that on further investigation some of it might prove to have been stolen or to be contraband. It would open the door to complete temporary confiscation of all an arrested person's property which was in his immediate possession * * *".

As indicated previously, the Defendant was acquitted of possession of the marijuana found in the trunk, upon the basis that the Court found insufficient evidence of his knowledge or right to custody or control over the contents of the trunk. All of the federal constitutional questions were raised in the trial court prior to the denial of the Motion to Suppress or the trial court judgment.

The Circuit Judge denied the speedy trial argument contending that the United States Constitutional provisions were not violated and denied the Motion to Suppress the evidence in an opinion, citing the Fourth Amendment to the Constitution of the United States and declaring that the United States Constitutional provisions were not violated. The Oregon Court of Appeals based its decision upon federal cases that are interpretive of the United States Constitution including the cases that have been decided just shortly before their opinion was rendered, as well as state cases that had interpreted the Federal Constitutional provisions. *Robbins v. California*, supra and *New York v. Belton*, supra; *Chambers v. Maroney*, 399 US 42, 52, 90 S Ct 1975, 26 L Ed 2d 419 (1970); *State v. Green*, 285 Or. 337, 340, 591 P2d 1362 (1979); *State v. DeChamplain*, 46 Or App 229, 233, 611 P2d 334 (1980); *State v. DeLong*, 43 Or. 183, _____P2d_____, (1979); *United States v. Johnston*, 497 F2d 397 (9th Cir 1974); *United States v. Chadwick*, 433 US 1, 97 S Ct 2476, 53 L Ed

2d 538 (1979); *Arkansas v. Sanders*, 442 US 753, 99 S Ct 2586, 61 L Ed 2d 235 (1980).

The speedy trial question was never explained by the Oregon Appellate Court, as indicated above.

ARGUMENT

A fourteen month post-indictment, post-arrest delay, which causes a defendant to lose the attorney he has chosen and therefore arguably violating that portion of Amendment VI which guarantees him legal representation at his trial, should be considered a lengthy enough delay and should be considered as prejudicial enough to the defendant to invoke the United States Constitutional protections designed to protect him.

The only difference in this case and in the other speedy trial cases where the courts have held that the Defendant's rights were violated is that this case involves a delay that was caused by a Circuit Court Judge who was cogitating a difficult question as to search and seizure. In that regard, Defendant recognized, as set out in *State v. Meikle*, 44 Or App 91, 605 P2d 301 (1980):

> "Unlike a prosecutor, however, a Court is not an adversary to a defendant and the delay of the court is not necessarily for purposes which are adverse to defendant's interest * * * moreover the judiciary's responsibility to safeguard the rights of the parties at times may, of necessity, override the

effectuation of expeditious administration of justice".

However, such a consideration should only go to the reason for the delay. The Defendant is not asking to punish the State for a failure to provide a speedy trial, but is asking that the protection afforded him be enforced whether the unreasonable delay is caused by the Courts, the District Attorney or the police. The Defendant asks for review by the Supreme Court of the United States because it appears to be a legitimate question of extreme public concern as to the accelerating delays in the court systems. If the delays are partly attributed to judges, then judges should face them and explain their significance. The Oregon Court of Appeals didn't do that, and rather than publish an opinion that contained allegations that a judge had unreasonably delayed the trial they simply, by footnote, stated there was an assignment of error that deserved no discussion. On the surface this would appear to be less than candid when the error really involved the judiciary itself. The Defendant, at no time, caused any of the delay nor asked for any delay, nor did he file papers untimely that could have caused the delay. The attorney representing the Defendant was available for many months, and resigned from the Bar and withdrew from the case on December 17, 1980. The attorney who finally tried the case for him had only two weeks with him before the trial and had not been at any of the preliminary matters or preliminary investigations

or hearings involving the search and seizure. In *Barker v. Wingo,* 4097 U.S.514, 33 L Ed 2nd 101 (1972) as adopted in *State v. Ivory,* supra, it was determined that there are four matters in determining whether a speedy trial has been denied, although prejudice (number 4) is not necessarily required. They are:

1. The length of the delay.
2. The assertion of right to speedy trial by defendant.
3. The reasons for the delay.
4. Prejudice, if any, to the accused. (not always required).

"If it is found that Defendant's Constitutional entitlement to a speedy trial has been denied, remedy is dismissal, which is a bar to further prosecution for the same offense."

"When the period of time that has elapsed after the defendant is held to answer is of such length as to be manifestly excessive and unreasonable it may be incumbent on the State to justify this delay in order to avoid dismissal of the indictment".

The District Attorney had the same evidence the day after this incident he had a year and three months later. The length of the delay apparently would be considered in light of who caused the delay, and more particularly, did the Defendant do anything to cause the delay?

In this case there is nothing in the record and it has never been claimed that the Defendant did anything to cause the delay, but the Judge, who is not an advocate and admittedly who was not acting for improper purposes caused the delay in his inability to promptly decide an important question of evidence. None of this is the Defendant's fault.

As to Number 2, the Defendant did ask for a speedy trial because, he, in writing, waived his right to a jury and asked to proceed on the same day the case was set for the hearing on the Motion to Suppress and there is no place in the file where he ever did anything except ask for his trial.

In the *Barker v. Wingo,* supra, case, the following appears:

> "A more neutral reason such as negligence should be weighed less heavily, but nevertheless should be considered, *since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.*" (emphasis added)

The final requirement is prejudice and this prejudice may be inferred from the delay itself, because the witnesses may lose recollection and the defendant himself may be subject to human error in his recollection of the facts, but in addition to that, in this case, Mr. Coe, the attorney for the Defendant, was available until December 31, 1980. That was 11

months and 13 days after the indictment for which the Defendant was charged was rendered by the Grand Jury and after the Defendant had been arrested. The attorney he obtained came into the case only two weeks before the trial, was required to begin at the beginning and proceed to trial without the benefit of the preliminary motions and arguments and rulings as to search and seizure. Again, according to *Barker v. Wingo*, supra,

> "The length of the delay in some cases may be presumptively prejudicial and assuming that it was not caused by the defendant in that the defendant desired a speedy resolution, proof of prejudice may be unnecessary".

ARGUMENT AS TO SEARCH AND SEIZURE

The reason that Defendant contends the Supreme Court of the United States should accept review as to the search and seizure question is because the Oregon Court has ignored the underlying principle involving the seizure of a closed container.

The opinion of the Court of Appeals would indicate that since the vehicle was capable of being moved and the Defendants could not be arrested since there was no probable cause they had committed a crime for which they could be imprisoned, therefore

exigent circumstances existed authorizing the seizure *of a closed container within the vehicle itself.*

This is not correct. The police had every right if there was probable cause to seize the vehicle and obtain a search warrant as to the vehicle. They further had every right to arrest the defendants for an infraction and hold them until suitable bail had been arranged.

Even more important is that at the time they seized the *closed container* (distinguished from the marijuana) they had every right to arrest the defendants because they had found a large quantity of marijuana in the trunk. At that time they had the right to seize the vehicle, arrest the Defendants and cause a search of the entire vehicle including all of the closed containers included therein.

The Court of Appeals of the State of Oregon engaged in circular reasoning, because they kept referring to exigent circumstances at a time when they said the police had no probable cause to arrest the defendants. What exigent circumstances are there in two people driving down the road in a vehicle, with a letter size, flat sachel in the back seat of the car, and less than an ounce of marijuana in the possession of a passenger. All persons who operate vehicles under such a theory would transmit to the police exigent circumstances because the vehicle has wheels, allowing the search without probable cause under a

theory that the persons could drive away. There was nothing in this case creating exigent circumstances at the time of the opening of the trunk except that the parties were in a vehicle. There was certainly nothing to establish exigent circumstances at the time of seizing the closed container because at that time the police already had sufficient evidence to arrest the persons in the car if the search of the trunk was lawful.

The Court of Appeals has stated they have not ruled that the presence of a small amount of marijuana in a vehicle authorized the search of the trunk, but the Defendant was found innocent of any contraband in the trunk and the Court of Appeals neglected to mention how any admission of the defendant taken with the small amount of marijuana in the vehicle could in any way establish probable cause that an innocent appearing, closed, flat, stationery-type sachel contained contraband and that is the evidence that was used to convict the defendant of a crime for which he is appealing.

The Oregon court went to great lengths to distinguish recent United States Supreme Court Cases, *New York v. Belton*, supra, and *Robbins v. California*, supra, and they have brought up additional facts: the smell of marijuana, the light weight of the bag (although the bag had to be disturbed by the officer in order for its weight to be determined), but

they have not mentioned in their opinion how the sachel, as a closed container, (not the paper bag of marijuana) could be seized, without a warrant, under a theory that probable cause existed as to its contents.

CONCLUSION

For the reasons stated hereinabove, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

SAM A. MCKEEN
Attorney for Defendant

Appendix

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF OREGON

Case Name: State v. Nichol

Case Number: A21085

X The prevailing party is Respondent

* * * * * *

The following entries will be made as appropriate at the time this decision becomes final. Attorneys see rules 11.05 & 11.10. The Supreme Court denied petition for review on February 24, 1982. Date final decision issued: March 3, 1982.

APPENDIX B

In the Court of Appeals of the State of Oregon

Opinion: Filed: December 14, 1981

State v. Nichol, Case Number A21085

GILLETTE, P.J.

Defendant appeals his conviction for possession of a controlled substance. ORS 475.992(4). He assigns as error the denial of his motion to suppress evidence

seized as a result of a warrantless search of his car.[1] We affirm.

Defendant was stopped by Trooper Collins for speeding. It is agreed that the stop was valid. As Collins approached the driver's window, he smelled marijuana smoke. The car contained defendant and one passenger, Laude. Collins requested and received defendant's identification. As Collins proceeded with his preliminary investigation, Trooper Robert Routt arrived to assist. At Collins' request, defendant got out of the car. Collins then asked defendant if there was marijuana in the car, and if so, where it was located. Initially, defendant said that he did not know. He then admitted that marijuana was somewhere in the car but claimed that he did not know where. Defendant also said, in response to questioning by Collins, that he did not know how much marijuana was in the car or whether his passenger, Laude, possessed any. Collins conducted a pat-down frisk of defendant's outer clothing. He did not find any contraband on defendant.

Collins then had Laude get out of the car. When questioned about the odor of marijuana, Laude responded that he had some marijuana on him and that he had just finished smoking a marijuana cigarette. During their conversation, Collins observed, in plain view, a plastic bag partially

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1. A second assignment of error, involving denial of defendant's motion to dismiss for lack of a speedy trial, does not require discussion.

protruding from Laude's pocket. It appeared to contain marijuana.

Following a pat-down frisk of Laude for weapons, Collins searched the passenger compartment of the car. He found a scissor-type clamp that was stained brown and that smelled of burnt marijuana. In the back seat he found a satchel, which he took into his possession but did not open. After finding the satchel, he removed the ignition key and opened the trunk. There he found a closed brown paper bag, some suitcases and a metal tool box. The bag was light in weight. Collins detected the odor of marijuana coming from it. Opening it, he found a white, opaque plastic bag inside. A stem was protruding from a hole in the plastic. Opening the plastic bag, the officer found a large quantity of marijuana. He then placed both defendant and his passenger under arrest.

Because he found the marijuana, the officer took the still-unopened satchel to the police station. Six hours later, it was opened pursuant to a warrant. In it were the amphetamines defendant was convicted of possessing in this case.

Defendant admits the stop was valid. The issues defendant presents are whether the warrantless search of the trunk was valid, whether the search of the paper bag found in the trunk was valid, and whether the warrantless seizure of the satchel was proper. A warrantless automobile search is appropriate where the search is supported by both

probable cause and exigent circumstances. *State v. DeLong*, 43 Or App 183, 602 P2d 665 (1979). We turn first to the issue of probable cause.

Collins had probable cause to justify searching the trunk. Defendant had admitted that there was some marijuana in the car. He added, however, that he did not know the amount or where it was located. Those statements provided probable cause for Collins to believe that marijuana might be found *anywhere* in the vehicle. Collins' discovery of marijuana in Laude's possession did not remove probable cause to justify a search of the rest of the car. Defendant's statements that he knew the car contained marijuana and that he did not know whether Laude possessed any gave rise to a reasonable inference that defendant was referring to marijuana other than that found on Laude.[2]

Exigent circumstances justified proceeding without a warrant. At the time he opened the trunk, the officer had found no contraband on defendant and less than one ounce of marijuana on the passenger. Possession of that amount of marijuana is a violation of ORS 475.992 (4)(F), Punishable by a $100 fine but not by imprisonment. The officer's practice was to issue a citation for a violation, rather than take a person into custody. *See* ORS 133.045. The officer's

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2. We do not decide here whether discovery of less than one ounce of marijuana in the passenger section of the car, without admissions of the type made by the defendant in this case, provide probable cause to search the trunk of a vehicle.

options were either to search the entire car or to risk the possibility that one or both of the occupants might drive it away while he sought a search warrant. Defendant would be able to drive away as soon as the citation process was completed. This is a classic case of exigent circumstances, justifying a warrantless search of the automobile. *Chamber v. Maroney,* 339 US 42, 52, 90 S Ct 1975, 26 L Ed 2d 419 (1970); *State v. Green,* 285 Or 337, 340, 591 P2d 1362 (1979); *State v. DeChamplain,* 46 Or App 229, 233, 611 P2d 334 (1980); *State v. DeLong,* supra.

Defendant next challenges the seizure and opening of the paper bag containing the marijuana. The seizure was justified by the odor of marijuana. Such a seizure and subsequent search is analogous to those permitted by the "plain view" doctrine. *See United States v. Johnston,* 497 F2d 397 (9th Cir 1974). Defendant relies on *Robbins v. California,* _____US_____, _____S Ct_____, 69 L Ed 2d 744 (1981). In *Robbins,* the Supreme Court, while unable to agree on a single rationale, held that the warrantless seizure of a closed, opaque container whose contraband contents are not in some way readily apparent is unconstitutional. 69 L Ed 2d at 751. *See also, United States v. Chadwick,* 433 US 1, 97 S Ct 2476, 53 L Ed 2d 538 (1979); *Arkansas v. Sanders,* 442 US 753, 99 S Ct 2586, 61 L Ed 2d 235 (1980).

The court went on to say, however,

> " * * * (I)f the distinctive configuration of a container proclaims its contents, the contents cannot fairly be said to have been removed from a searching officer's view. *The same would be true, of course, if the container were transparent, or otherwise clearly revealed its contents* * * *." *Robbins v. California*, supra, 69 L Ed 2d at 751. (Emphasis supplied.)

As the foregoing quotation shows, Robbins does not help defendant. Here, unlike in *Robbins* the odor from the paper bag revealed its contents as fully as if it had been made of clear, not opague, material. The seizure and opening of the bag was proper.

Finally, defendant argues that the seizure and search of the satchel was unconstitutional. We hold otherwise. The discovery of contraband elsewhere furnished probable cause to support the seizure of the satchel and furnished the basis for later obtaining the search warrant. However, because its contents were not readily apparent, the police postponed searching it until they had obtained a search warrant. This was precisely what the Constitution permits and requires. *United States v. Chadwick, supra; Arkansas v. Sanders, supra; Robbins v. California, supra.*

Affirmed.

APPENDIX C

Opinion and Order of The Honorable Ted Abram, dated December 9, 1980:

The initial stop for speeding is a valid stop. The oficer smelled marijuana upon approaching the vehicle, and asked the driver, Mr. Nichol. to exit the vehicle. Under *State v. Ferrell*, 41 Or. App. 51, Defendant can be asked to step out of his car and asked preliminary questions. The defendant was not in custody and statements made by him at that time are not suppressed.

Mr. Nichol was asked about the marijuana and the officer's testimony at the motion to suppress was as follows:

"Q. After you had him at the rear of the vehicle --and I guess we should back up -- what did you ask him?

A. Okay, I asked him if there was any marijuana in the car, and if so, where the marijuana was.

Q. What was his resonse to that?

A. He first stated in substance, that he didn't know. I asked him again the same question. He stated, "it is somewhere in the car."

Q. Was this immediately after your first question?

A. Yes.

Q. He stated, 'it is somewhere in the car?'

A. He stated, 'it is somewhere in the car.' I asked him 'where in the car?' and he stated, 'I don't know, it is just in the car.'

Q. Did you ask him how much was there?

A. Yes, I asked him about the quantity, and he shrugged his shoulders and said that he didn't know."

As stated previously at our last hearing, marijuana found on Laude is suppressed for the reason given.

Again, as stated previously, I specifically find that the officer did not look into the contents of the satchel as he was searching the interior of the car.

Under *State of Oregon vs. DeLong,* 31 Or. App. 133, the officer had probable cause to search both the passenger's portion of the vehicle and the trunk. Upon sighting the paper sack, he picked it up and smelled the odor of marijuana and knew by the feel that the substance inside was quite-probably marijuana. He had probable cause to seize and search the paper sack under *State v. Green,* 285 Or. App. 337 and *Chambers v. Maroney,* 399 US at 44, 90 S Ct. 1975, 26 L Ed 2d 419.

Once probable cause has been established that the car contained evidence, the issue is whether the evidence would likely have disappeared. The two defendants were not charged with any crimes, the incident took place on a State highway and there would be nothing to prevent the defendants from destroying or secreting the contraband.

The next issue was whether the sack of marijuana is a closed container requiring a search warrant. From the evidence, I am convinced that the

sack was closed and that the officer had a reasonable belief that by smell, touch and weight, coupled with the statement made by defendant Nichol, that the sack contained marijuana. In *Arkansas v. Sanders* 61 L Ed 235, the Supreme Court of the United States stated that not all containers and packages deserve the full protection of the Fourth amendment. I believe this to be such a container. From the odor, its weight, its density, the defendants did not have a reasonable expectation of privacy because the contents can be inferred from the officer's senses.

The motion to suppress is denied.

Sincerely,
/s/ Ted Abram
Circuit Judge

APPENDIX D

Order

of The Honorable Donald A. W. Piper, dated March 5, 1981.

The defendant's motion to dismiss came before the Court for hearing March 4, 1981; defendant appearing by Judith Newman, Deputy District Attorney for Klamath County; the defendant appearing in person and by Sam A. McKeen, his attorney; the Court heard arguments of counsel, testimony on behalf of the defendant, and thereafter took the issue under advisement and now has

reviewed the entire file and the memoranda of counsel and being fully advised in the premises, states:

In considering the defendant's motion to dismiss on constitutional grounds for alleged violation of his right to a speedy trial the Court has balanced the following factors:

1. Length of the delay,
2. Reasons for the delay,
3. The defendant's assertion of the right that he has to a speedy trial, ,
4. Prejudice to the defendant from the delay. (Concerning balancing, see *Haynes vs. Burks*, 290 Or. 75)

The Court finds that defendant was indicted within 14 days of the alleged date of the commission of the offense. He was released on security release within 20 days of the date of the alleged offense and has remained at liberty throughout the balance of the elapsed time. If the trial proceeds as presently scheduled it should take place within 14 months of the alleged date of the offense. The post indictment delay is serious enough to warrant that the Court look into the other factors. As to the reasons for the delay, the Court finds no evidence that the State tried to prejudice the defendant's right in any respect. The reasons for the delay were the determination by the trial court of complicated legal factors which were in a currently developing body of law during the period of the delay. The Court weights (sic) this factor against the defendant. The Court finds that the defendant did

not expressly or impliedly assert the right that he has to an earlier trial date than the one now set. The Court weights (sic) this factor against the defendant. Concerning prejudice to the defendant, he has been caused mental and emotional strain of a serious charge hanging over his head for a rather long period of time, however, it does not appear that the presentation of the defense of this defendant has been prejudicial in any of the typical ways. The Court weights (sic) this factor against the defendant. Accordingly, it is

ORDERED that the motion of defendant to dismiss be and the same hereby is denied, and that the case proceed to trial as presently scheduled.

Dated this 5th day of March, 1981.

/s/ Donald A. W. Piper
Circuit Judge

APPENDIX E

Waiver of Jury

COMES NOW THE undersigned, having been fully advised of his rights, freely and voluntarily waives the right to trial by jury in the above.

Dated this 15th day of April, 1980.

/s/ Gerald Nichol
Gerald Nichol, Defendant

APPENDIX F

MEMORANDUM BRIEF IN SUPPORT OF AFFIDAVIT AND MOTION TO SUPPRESS EVIDENCE FOR VIOLATION OF CONSTITUTIONAL RIGHTS RELATIVE TO ILLEGAL SEARCH AND SEIZURE 4th AMENDMENT RIGHTS, U.S. CONSTITUTION, 14th AMENDMENTS RIGHTS, U.S. CONSTITUTION and OREGON CONSTITUTION SECURING PERSON THE RIGHT OF PRIVACY IN THEIR PERSONS, EFFECTS, etc.

Voluminous and not appendixed in its entirety:

"* * * and that such search would be illegal (searches conducted without warrant are per se, unreasonable. Constitution Article I, Section 9 U.S.C.A. Const. Amend. 4", (Memorandum Brief, page 5, line 26, through page 6, lines 1 through 3.)

Filed and dated April 11, 1980.

/s/ Hal F. Coe
HAL COE,
Attorney for defendant-Nichols

Opposition

Office - Supreme Court, U.S.
FILED
JUL 21 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2064

In the Supreme Court of the United States

OCTOBER TERM, 1981

GERALD NICHOL,

Petitioner,

v.

STATE OF OREGON,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of the State of Oregon

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

Does the Fourth Amendment prohibit the seizure and subsequent opening of a small satchel found in an automobile which police have probable cause to believe contains marijuana?

Is an accused's Sixth Amendment speedy trial right violated by a fourteen-month post-indictment delay when the trial court had the accused's motion to suppress under advisement for eight months, the accused failed to assert his right to speedy trial, and has shown no prejudice?

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The decision of the Oregon Court of Appeals affirming petitioner's conviction is reported as *State v. Nichol,* 55 Or. App. 162, 637 P.2d 625 (1981). The Oregon Supreme Court's summary denial of a petition for discretionary review of the decision of the Oregon Court of Appeals is reported at 292 Or. 581, 644 P.2d 1130 (1982).

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3). Respondent challenges petitioner's jurisdictional statement in two respects.

First, petitioner prays for a petition for a writ of certiorari "to the Supreme Court of the State of Oregon." In so doing, petitioner asks for a writ to the wrong court; the Oregon Court of Appeals issued the decision about which he now complains.

Second, the petition appears to be untimely. Petitioner regards March 3, 1982, the date on which the "final decision" in this case was "issued" by the court of appeals, as the date from which the time ran for filing a petition for writ of certiorari (Petition at 3, 20). Petitioner is in error. Rule 20.4 of this Court states in material part:

> "The time for filing a petition for writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate (or its equivalent under local practice) * * *."

Under this rule, the time for filing the petition in this case ran from February 24, 1982, the date the Oregon Supreme Court, Oregon's court of last resort, denied a petition for discretionary review of the decision of the court of appeals.[1]. Or. Rev. Stat. § 19.190(1) provides in material part:

> "* * * The date of the filing of the decision shall be deemed to be the date of entry of the judgment, except that the judgment of the Court of Appeals shall be stayed until the expiration of the time provided in [Or. Rev. Stat. §] 2.520 for filing a petition for review in the Supreme Court * * *."

According to "local practice" and the application of Rule 20.4, the petition in this case was filed after the sixty-day period provided for criminal cases under S. Ct. R. 20.1, and hence the petition is untimely.

SUPPLEMENTAL SUMMARY OF FACTS

On January 19, 1980, at approximately 7:25 p.m., Oregon State Trooper John Collins stopped petitioner's vehicle for exceeding the speed limit. Collins had clocked petitioner at 75 and 83 miles per hour. (Tr. 13-14, 34)

After parking his car behind petitioner's vehicle, the officer approached the vehicle on the driver's side.

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[1] Petitioner filed no further request for rehearing in the Oregon courts.

He observed that, in addition to defendant, the car had another passenger, later identified as Mr. Laude. As he walked up to petitioner's vehicle, Collins detected the odor of burnt marijuana emanating from the open window. The odor became very strong as the officer got closer to the car, and requested and received petitioner's identification. Given the obvious odor of marijuana, Collins decided that he ultimately would search the vehicle for evidence of the drug. (Tr. 14-16).

As Collins began his preliminary investigation, a back-up patrol car arrived, driven by Trooper Robert Routt. Collins had petitioner exit the vehicle and then asked him if there were any marijuana in the car and, if so, where it was located. Petitioner responded that the car contained marijuana, but he did not know how much there was or where it was located. (Tr. 17-21, 48).

Pursuant to police policy, Collins conducted a pat-down frisk of petitioner's outer clothing for weapons. The policy directed that a frisk be conducted before a full vehicular search, since during the vehicular search the officer is in a vulnerable position. (Tr. 21, 45).

Collins had the passenger, Laude, exit the car and step to its front. In response to Collins' questioning about the odor of marijuana, Laude said that he had some of the drug on his person and had just finished smoking a marijuana cigarette. During their conver-

sation, Collins observed in plain view a plastic bag protruding from Laude's pocket. It appeared to contain marijuana. (Tr. 22-24).

Collins next performed a pat-down frisk of Laude's outer clothing, pursuant to the aforementioned policy, and then began to search the vehicle. In the passenger compartment, Collins found a scissor-type clamp, stained brown by flame and smelling of marijuana. He also found a closed leather satchel, which he did not open but merely placed on top of the car. (Tr. 24-26).

Having completed his search of the passenger compartment, Collins extracted the key from the ignition and opened the trunk. He found suitcases, a tool box, and a brown paper bag. (Tr. 26).

Lifting the paper bag, Collins found that it was unusually light in weight for its size. He "sniffed" the outside of the bag and smelled the distinct odor of marijuana emanating from it. Opening the bag, the officer found a white plastic bag with a green stem protruding from a hole in its side. He opened the plastic bag and confirmed that it contained marijuana. (Tr. 27).

Petitioner and Laude were placed under arrest and advised of their *Miranda*[2] rights. The vehicle, a rental car which petitioner had parked on the shoulder of the highway, was towed and impounded. (Tr. 27-28, 32, 71).

[2] *Miranda v. Arizona*, 386 U.S. 436 (1966).

At 1:41 a.m., Collins obtained a search warrant for the satchel and the tool box. He found a scale inside the tool box and methamphetamines, a controlled substance, inside the satchel. (Tr. 28, 34). The brown paper bag contained 14 ounces of marijuana. (Tr. 63).

REASONS FOR DENYING THE WRIT

I. *The Seizure Issue*

Petitioner does not challenge the validity of the "stop" of his car, his questioning by the officer, or the search of the vehicle. His only claim involves the six-hour seizure of the small satchel preceding its opening and search pursuant to a warrant. According to petitioner, Trooper Collins lacked probable cause and exigent circumstances to seize the satchel. For a number of reasons, petitioner's analysis of the law is erroneous.

In justifying the satchel's seizure, the court of appeals stated:

> "* * * The discovery of contraband elsewhere furnished probable cause to support the seizure of the satchel and furnished the basis for later obtaining the search warrant. However, because its contents were not readily apparent, the police postponed searching it until they had obtained a search warrant. This was precisely what the Constitution permits and requires." 55 Or. App. at 167, 237 P.2d at 627.

In support of its position, the court cited three "closed container" cases decided by this Court: *Robbins v. California*, 453 U.S. 420 (1981); *Arkansas v. Sanders*,

442 U.S. 752 (1980); and *United States v. Chadwick,* 433 U.S. 1 (1979). Since the Oregon court's decision in this case, this Court has overruled *Robbins* in *United States v. Ross,* — U.S. — (June 1, 1982). Trooper Collins' seizure of the satchel was proper under the cases cited by the court of appeals. This Court's decision in *Ross* merely underscores the propriety of the police conduct.

In *Ross,* this Court held that, when police have probable cause to search a vehicle, they may conduct a warrantless search of every part of the vehicle, including any packages and containers which may conceal the object of the search. Here, Trooper Collins had probable cause to believe petitioner's car contained an unspecified amount of marijuana, a controlled substance. His probable cause arose from personal observation as well as petitioner's admission that the car concealed some marijuana, although he did not know where or how much. The satchel, however small, was a logical place to look for even a minimal quantity of the drug.[3].

Under *Ross,* Collins had the authority to open the satchel immediately. Instead, he followed the holdings of this Court in *Robbins, Sanders,* and *Chadwick,* seized the unopened satchel, and awaited a search

[3]Petitioner's concern over the amount of the drug is irrelevant. Possession of *any* amount of marijuana is illegal in Oregon, and possession of an aggregate amount over one ounce is a felony. *See* Or. Rev. Stat. § 475.992.

warrant. In the meantime, Collins discovered a supply of contraband in the vehicle's trunk, thereby supplying more probable cause to believe that the satchel contained contraband. The procedure followed was precisely what the law at the time required, and it was more deferential to the petitioner's alleged privacy interest in the satchel than *Ross* requires.

Moreover, at the time of petitioner's arrest, the police were justified in searching the passenger compartment of his vehicle and all closed containers inside it as a search incident to arrest. *New York v. Belton,* 453 U.S. 454 (1981). Instead of an immediate search of the satchel, Collins set it aside and obtained a warrant from a detached magistrate. Thus, petitioner received more protection than he was entitled to receive under either *Ross* or *Belton.*

II. *The Speedy Trial Issue*

Petitioner's speedy trial claim, the court of appeals noted, "does not require discussion." *State v. Nichol, supra,* 55 Or. App. at 164 n. 1, 637 P.2d at 626 n. 1. It is indeed hard to fathom how petitioner's right to a speedy trial was violated in this case by the fourteen-month post-indictment delay during which the trial court spent nine months considering the merits of petitioner's motion to suppress.

This Court in *Barker v. Wingo,* 407 U.S. 514 (1972), established a four-factor test to be considered in

assessing an alleged constitutional violation of the right to speedy trial:[4]

> "* * * length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Id.* at 530.

Assuming, *arguendo,* that the post-indictment delay is of sufficient length to "trigger" further analysis, petitioner's claim must fail under each of the remaining factors.

Any assessment of the blame for the delay in this case must fall on petitioner. The indictment was filed on January 31, 1980, and the original trial date was set for April 16, 1980. One week before trial, petitioner filed his motion to suppress. Two days later, he filed a lengthy supporting memorandum. His motion and memorandum raised a number of constitutional questions, including the validity of the search of the satchel. For obvious reasons, the trial court could not reach the question of petitioner's guilt or innocence on April 26, 1980, since it heard arguments and considered evidence on petitioner's motion to suppress on that date.

Unlike a prosecutor, a court is not an adversary to a criminal defendant, and the delay by the court is not necessarily for purposes which are adverse to the interests of the accused. The judiciary's responsibility to safeguard the rights of the parties at times may

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[4]The same test applies under the Oregon Constitution. *State v. Ivory,* 270 Or. 499, 564 P.2d 1039 (1977).

necessarily for purposes which are adverse to the interests of the accused. The judiciary's responsibility to safeguard the rights of the parties at times may necessarily override the expeditious administration of justice. Consideration of a court's attention to this responsibility must be taken into account when assessing the weight to be given the reason for the delay. *State v. Meikle,* 44 Or. App. 91, 605 P.2d 301 (1980). 1980, to December 9, 1980, the court considered the oral and written arguments of counsel on an array of constitutional issues raised by petitioner. The parties and the court understood that the motion to suppress would be dispositive of the case. On April 16, 1980, petitioner waived trial by jury and stipulated to the admission in his bench trial of all evidence adduced at the suppression hearing. Determination of the constitutional issues was crucial to petitioner's case, and it was at his request and for his benefit that the delay occurred.

Petitioner's assertion of his speedy trial right also was untimely. He waited until March 4, 1981 — two days before he was found guilty in a trial on stipulated facts — before asserting his right to a speedy trial. Prior to that date, he made no complaint about the delay and no demand for prompt adjudication.

Additionally, the record does not support petitioner's claim of prejudice. Since two other factors are not in his favor, he is not entitled to a conclusion of

"presumptive prejudice" under *Barker v. Wingo, supra*. For actual prejudice, petitioner points to his loss of the trial attorney of his choice, the appointment of other counsel, the minimal period of two weeks to prepare for trial, and the allegedly dimmed memories of witnesses. His argument is not supported by the facts.

It is evident that petitioner *had* the attorney of his choice during the crucial proceedings of this case. Specifically, he was represented by that attorney when his motion to suppress was presented and considered by the trial court. Since the motion to suppress was dispositive of the case, what happened thereafter was of minimal significance. Inadequate time to prepare for "trial" and the dimmed memory of witnesses, if any, was also insignificant, since the evidence at "trial" was a stipulation which had been arranged months before by petitioner's chosen attorney. In sum, petitioner suffered no prejudice whatsoever from the delay in his case.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Attorney General of Oregon

WILLIAM F. GARY
Solicitor General

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